IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1098 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

SUMERSING KADAMSINGH SHIKH SIKLIGAR

Appearance:

1. Criminal Appeal No. 1098 of 1998

MR IM PANDYA, APP for Petitioner No. 1

MR JB PARDIWALA, Amicus Curie for Respondent No. 1-2

MR YATIN SONI for Respondent No. 3

CORAM : MR.JUSTICE A.L.DAVE
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 05/12/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. This is an appeal preferred by the State of Gujarat against acquittal of inall 12 accused charged under Section 25 (1) (1-AA), 25 (1-A), 25 (1-B) (a) (b) (c) of the Arms Act, who came to be acquitted by judgment and order rendered by the learned Addl. Sessions Judge, Panchmahals at Dahod in Sessions Case No. 251 of 1996 on October 4, 1997 acquitting all of them.

2. At the time of admission, leave was granted and appeal was admitted in respect of respondents nos. 1, 2 and 3 (original accused nos. 1, 2 and 3) and the appeal against rest of the respondents was dismissed. Non-bailable warrant was issued against respondents nos. 1, 2 and 3 and on execution of that warrant, respondents nos. 1, 2 and 3 have been apprehended and are in jail.

2.1. The applicants (respondents nos. 1, 2 and 3) had preferred an application being Criminal Misc. Application No. 7495 of 2002 praying for bail pending the appeal which was placed before this Bench on 29th of November, 2002 and considering the facts of the case, the office was directed to place the appeal for final hearing today.

3. Brief facts of the case are that C.P.I. Dahod received some intelligence to the effect that accused no. 3 residing at Lakhankyar Faliya of village Dashla is sheltering two Shikh persons and that they are engaged in some suspicious activities under the garb of lock repairing profession. A massive raid consisting about 25 to 30 personnel was organised on 23rd June, 1996. It is the case of the prosecution that when the raid was carried out in the house of accused no. 3, five Shikhs were present, who started running helter-skelter. They were chased and out of five, two were apprehended. They were Sumersing Kadamsing and Gaddasing Kadamsing i.e. accused nos. 1 and 2 respectively. It was found that at the house one country made revolver, 3 Tamanchas, 2 guns, 8 cartridges of .12 bore, 19 cartridges of the revolver and some weapon making instruments were found. The police filed chargesheet and at the trial a charge was framed. The accused persons pleaded not guilty to the charge and claimed to be tried.

4. Considering the evidence led by the prosecution the trial Court came to conclusion that the

prosecution was not able to establish the charges against ay of the accused and recorded acquittal. Aggrieved by the said judgment and order, the State has preferred this appeal.

5. Respondents nos. 1, 2 and 3 are original accused nos. 1, 2 and 3 respectively and they are charged under section 25(1), (1AA) of the Arms Act. This Court is required to examine whether the trial Court committed an error in recording acquittal of these 3 respondents for the said offences.

6. Heard Ld. A.P.P. Mr. Pandya for the appellant State and learned advocate Mr. Soni for respondent no. 3 and Mr. Pardiwala, learned advocate for respondent nos. 1 and 2.

7. We have perused the record and proceedings and have gone through the judgment of the trial Court.

8. Ld. A.P.P. Mr. Pandya submitted that when the raid was carried out accused nos. 1, 2 and 3 were present and they have been arrested while they were trying to flee. Unauthorised weapons have been seized which indicates their involvement in dealing with arms and, therefore, the trial Court committed an error in recording acquittal.

9. Learned advocate Mr. Pardiwala for respondents nos. 1 and 2 submitted that out of the witnesses examined by the prosecution, only two witnesses have supported the prosecution case. Both of them are police witnesses. Mr. Pardiwala submitted that even if their evidence is accepted at the face value, what emerges is that there is no evidence to indicate that respondent no. 3 was the owner of the house, which was raided. Mr. Pardiwala submitted that there is nothing to indicate that the arms which are alleged to have been seized were in working condition. The arms which are seized would not fall within the definition of prohibited arms as defined in section 2 (i) of the Arms Act. It is contended that the Investigating Officer, who was part of the raiding party, has admitted in terms that he had not seen any of the caused persons running away. Last but not the least Mr. Pardiwala submitted that witness Kantilal, who has apprehended accused nos. 1 and 2, has not been examined. Mr. Pardiwala therefore, urged that the evidence as a whole cannot be said to be sufficient to upset the order of acquittal. He, therefore, urged that the appeal may be dismissed.

10. Mr. Soni, learned advocate appearing for respondent no. 3 has adopted the arguments advanced by learned advocate Mr. Pardiwala. He also urged that the appeal may be dismissed.

11. We have perused the record and proceedings. As rightly pointed out by learned advocate Mr. Pardiwala, there are only two witnesses to support the prosecution case. One of them is Himatsinh Sevabhai P.W. 7, who was Police Jamadar. He has been examined at Exh. 35. He says that he received a Warthy from C.P.I. that they have to go to village Dashla in the Lakhankyar Faliya. While they were waiting near Khan river, C.P.I. and P.S.I. Vadia arrived there alongwith P.S.I. Pathan and other police officers. They went to the house of Ishvar Teru - respondent no. 3 in Lakhankyar Faliya of village Dashla. There was information that there are Tamanchas. He says that when they raided the house, there were 5 Shikh persons, who ran away. However, two of them were apprehended. They are respondent no. 1 and respondent no. 2. During the raid one revolver, 3 Tamanchas, 2 guns, 8 .12 bore cartridges and 19 cartridges for revolver and certain weapon making instruments were found. A panchnama was drawn in this regard. Witness, during cross-examination, admits that the two persons were arrested at a distance of about 3 to 4 KMs. They were apprehended by constable Kantibhai (incidentally it would be appropriate to note that Constable Kantibhai, though cited as a witness, has not been examined by the prosecution). The witness further says that there are about 30 persons in the raiding party. To prevent persons from running away, arms were fired, the fleeing persons were at a distance of about 400 mtrs. and were within the range of the bullets fired by the police. He says that the two persons were brought after about half an hour.

11.1. The witness admits that respondent no. 3 was not present when the raid was carried out. He also admits that there are 4 houses in a row and they entered the house without examining Panchayat number. They found Samsu Ishvar at the place. He does not know if Samsu Ishvar has been arrested. He also admits that seizure was made in his absence. (It would again be appropriate to note that Samsu Ishvar was admittedly present in the house wherefrom arms were seized, that he was in occupation of the house and still he has not been prosecuted).

12. The next supporting witness is

Hasmukhbhai Arjanbhai Vadia, P.S.I. Dahod. He has been examined at Exh. 36. He says that he was present at the time of the raid. He says that son of respondent no. 3 was present at the time of raid. He had interrogated him. He described the weapons which were seized. During cross-examination he admits in clear terms that he had not seen anybody running away from the place at the time of raid. He also admits that he had not seen any Shikh prior to the incident. He also admits that he had not collected any evidence as regards ownership of the house which was raided. He admits that he had felt it necessary to collect evidence about the ownership of the house, but he had not contacted either Talati or Sarpanch. He admits that about 4 to 5 houses are located in a row, all of which are occupied. He states that he had not recorded statement of any of the neighbours. He admits that he has not arrested Samsu Ishvar. He also states that Samsu Ishvar stays in the said house alongwith his family.

13. The rest of the witnesses have not supported the prosecution case. The result is that there is total absence of any independent evidence. The raid and the seizure do not get support from any independent piece of evidence.

14. What emerges therefrom is that police constable Kantibhai, who is claimed to have arrested respondents nos. 1 and 2, has not been examined. P.W. 8 P.S.I. Vadia - the Investigating Officer says that he had not seen anybody running away. Head constable Himatsinh Sevabhai P.W.7 does not say about anybody running away and, therefore, there is no first hand evidence led by the prosecution about the apprehension/arrest of respondents nos. 1 and 2 though it was available.

14.1. It is also worthwhile to note that the Investigating Officer has not collected any evidence about ownership of the house, which was raided and wherefrom the contraband weapons were seized. The case of the prosecution that respondent no. 3 is the owner of the house, therefore, does not get any support from independent evidence. The two witnesses who have been examined are not able to assertively say that the house, which was raided was of the ownership of respondent no. 3 because no evidence in this regard was collected by the Investigating Officer though he admits that he had felt it necessary so to do.

15. The investigating agency has not

prosecuted son of respondent no. 3 though admittedly as per say of P.S.I. Vadia, he occupies the house with his family and he was present at the time of the raid.

16. Mr. Pardiwala was right in contending that there is total absence of evidence to indicate that the weapons which were seized were in working condition. There is also total absence of evidence to indicate that the weapons seized or the ammunition seized were prohibited arms or prohibited ammunition as defined under the Arms Act. In absence of these pieces of evidence the trial Court could not have recorded a conviction.

17. It would be appropriate at this stage to refer to Section 25 (1-AA), which runs as under :-

> "Whoever manufacturers, sells, transfers, converts, repairs, tests or proves or exposes or offers for sale or transfer or has in his possession for sale, transfer, conversion, repair, test or proof, any prohibited arms or prohibited ammunition in contravention of Section 7 shall be punishable with imprisonment for a term which shall not less than seven years but which may extend to imprisonment for life and shall be liable to fine."

It is amply clear that it relates to prohibited arms or prohibited ammunition regarding which the prosecution has not led any evidence. There is no report of a ballistics expert in this record and, therefore, it is difficult to come to a conclusion that any error is committed by the trial Court in recording acquittal in this regard. So far as Section 25 (1) of the Arms Act is concerned, which runs as under :-

> "25. Punishment for certain offences.- (1) Whoever -
>
> (a) manufacturers, sells, transfers, converts, repairs, tests or proves or exposes or offers for the sale, or transfer, or has in his possession for sale, transfer, conversion, repair, test or proof, any arms or ammunition in contravention of Section 5; or
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> (b) shortens the barrel of a fire arm or converts an imitation fire-arm into a fire-arm in contravention of Section 6; or

(c) [x x x]

(d) brings into, or takes out of, India, any arms or ammunition of any class or description in contravention of Section 11,

shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine."

Here also, as seen above, there is no evidence regarding any of the act indicated in the said section, which can be attributed to either respondent no. 1 or 2 as there is no reliable evidence about the apprehension of respondents nos. 1 and 2 at the time of the raid or soon thereafter while they were trying to flee as alleged. The person apprehending them has not been examined. The other evidence as discussed above does not inspire confidence.

17.1. So far as respondent no.3 is concerned, his presence is not established. There is no other evidence to show his ownership or possession of the place raided.

18. Taking overall view of the matter, we do not find any merit in this appeal. We are of the opinion that no error is committed by the trial Court in recording acquittal of respondents nos. 1, 2 and 3. Nothing is indicated to us which could persuade us to upset the said finding. Appeal, therefore, deserves to be dismissed and the same is dismissed. Respondents nos. 1, 2 and 3 be set at liberty forthwith, if not required in any other case.

19. Before parting with the matter, we would like to place on record the appreciation of the services rendered to the Court by learned advocate Mr. Pardiwala.

[A. L. DAVE, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.